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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

FREDRICK and ANNALESA THOMAS; and
JO-HANNA READ, as Guardian ad Litem of
E.T., a minor,

Plaintiffs,

v.

JASON CANNON; BRIAN MARKERT;
RYAN MICENKO; MICHAEL WILEY;
MICHAEL ZARO; CITY OF FIFE; CITY OF
LAKEWOOD; and PIERCE COUNTY
METRO SWAT TEAM,

Defendants.

FREDRICK THOMAS and ANNALESA
THOMAS, as Co-Administrators of the Estate
of Leonard Thomas, and its statutory
beneficiaries,

Plaintiffs,

v.

BRIAN MARKERT; MICHAEL WILEY;
NATHAN VANCE; MICHAEL ZARO;
SCOTT GREEN; JEFF RACKLEY; CITY OF
FIFE; CITY OF LAKEWOOD; PIERCE
COUNTY METRO SWAT TEAM; and JOHN
DOES 1 through 10,

Defendants.

Nos. 3:15-05346 BJR
3:16-cv-05392
CONSOLIDATED CASES

ORDER GRANTING IN
PART AND DENYING IN
PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

In the early hours of May 24, 2013, Leonard Thomas was shot and killed by a Pierce County Metro SWAT Team member while clutching his four year old son, E.T. The shooting occurred after a four hour standoff at the home where Leonard lived with his parents, Fredrick and Annalesa Thomas.¹ The Thomas family has brought two complaints related to these events, and the cases have been consolidated. In one, Fredrick and Annalesa Thomas, as co-administrators of the Estate of Leonard Thomas (hereinafter the “Estate”), bring suit under 42 U.S.C. § 1983 for the unreasonable search and seizure of Leonard’s home, in violation of the Fourth Amendment; the unreasonable seizure of Leonard’s person, in violation of the Fourth Amendment; and the deprivation of Leonard’s interest in a familial relationship with his son without due process of law, in violation of the Fourteenth Amendment. The Estate also brings state law claims for outrage and negligence.

Additionally, Fredrick and Annalesa Thomas, and Jo-Hanna Read, as Guardian ad Litem of E.T. (hereinafter the “Family” or “Individual” Plaintiffs), bring suit under § 1983 for the unreasonable search and seizure of the home of Fredrick, Annalesa, and E.T., in violation of the Fourth Amendment; the unreasonable seizure of E.T., in violation of the Fourth Amendment; the unreasonable seizure of Fredrick, in violation of the Fourth Amendment; and the deprivation of E.T.’s interest in a familial relationship with his father, and Fredrick and Annalesa’s interest in a familial relationship with their son, in violation of the Fourteenth Amendment. These Plaintiffs also bring state law claims for outrage, the false arrest of Fredrick, negligence, and the prompt production of public records.

¹ Because the Thomas family members share the last name, the Court, like the parties, will refer to them by their first names.

Currently before the Court is Defendants’ Motion for Summary Judgment (Doc. No. 57).² Having reviewed the parties’ submissions, the record of the case, and the relevant legal authority, the Court will GRANT in part and DENY in part Defendants’ Motion for Summary Judgment.

II. FACTUAL BACKGROUND³

Leonard lived with his four-year-old son, E.T, in a home in Fife owned by his parents, Fred and Annalesa. Leonard had full custody of E.T. Kim Thomas, E.T.'s mother and Leonard's estranged wife, lived in a nearby town. In the evening of May 23, 2013, Leonard called Annalesa, said he was depressed over the death of a friend, and asked her to come take E.T. for the night. (Doc. No. 58 Ex. 1 at 72.) Annalesa was concerned that Leonard had been drinking that night, after a year of sobriety, and worried that Leonard would fall asleep and not be able to attend to E.T. (*Id.* at 127.) Leonard also called Kim and asked her to spend the night with him. (Doc. No. 58 Ex. 2 at 115.) Kim declined to spend the night, but said she would come pick up E.T. (*Id.* at 117.)

Kim arrived at approximately 9:00 pm, and recognized that Leonard was intoxicated. (*Id.* at 124.) Annalesa arrived thereafter, and determined that both Leonard and E.T. should spend the night at her and Fred’s home. (Doc. No. 77 Ex. 2 at 75.) Annalesa did not feel like E.T. was in danger from Leonard’s intoxication, but she was concerned that E.T. would be unattended should Leonard fall asleep. (*Id.* at 90.) Leonard did not want to go home with Annalesa, and became upset as Annalesa prepared to leave with E.T. (*Id.* at 78-79.) Annalesa became “exasperated” when Leonard stopped cooperating, and threatened to call the police if Leonard did not let E.T. go

² Plaintiffs have requested oral argument on this Motion. Because the Plaintiffs have fully presented their arguments in their briefs, the Court finds that oral argument is not necessary.

³ The Court devotes significant space to recounting the facts because they are so important to the resolution of this case. The following facts are drawn primarily from the deposition testimony of the various individuals involved. Material disputes are noted where accounts of the incident diverge.

1 with her. (*Id.* at 79-80.) The argument between Leonard and Annalesa escalated, and Annalesa
2 slapped Leonard with an open hand twice on his face, drawing blood. (*Id.* at 86.) Annalesa called
3 911 at 10:18 pm, and told the dispatcher she needed the police. (*Id.* at 83.) Leonard grabbed the
4 phone from Annalesa, and told the dispatcher that his mother had hit him and that he needed help.
5 (Doc. No. 58 Ex. 6 at 1.)

6 Fife Police Officers Pat Gilbert and Angelito Quinto responded to the Thomas house.
7 (Doc. No. 58 Ex. 7 at 1.) Annalesa and Kim told Officer Quinto that Leonard was distraught over
8 the death of a close friend, that Leonard was highly intoxicated, and the Leonard had resisted their
9 efforts to take E.T. for the night. (*Id.*) As other officers arrived at the scene, Officer Quinto
10 advised Lieutenant Scott Green that there was probable cause to arrest Leonard for “Assault 4 DV
11 [domestic violence] and Interfering with the reporting of DV.” (*Id.* at 2.) Lt. Green was aware
12 that Leonard had mental health issues. (Doc. No. 58 Ex. 9 at 1.)

14 At approximately 10:30 pm, Lt. Green contacted Leonard via cell phone. (Doc. No. 58 Ex.
15 10 at 1.) During their initial 24 minute conversation, Leonard told Lt. Green that he was upset
16 about the recent loss of a personal friend and had requested his mother come to pick up his son;
17 that he had subsequently been assaulted by his mother and was bleeding from the face; that he had
18 locked all the doors and would not be coming out of the house or allowing officers inside the
19 house; and that the police were scaring his four-year-old son and should leave his property. (*Id.*)
20 Lt. Green informed Fife Police Chief Brad Blackburn that Leonard was a suspect in at least two
21 crimes, drunk, irrational, and barricaded inside with a four-year-old child. At approximately
22 11:21 pm, Chief Blackburn advised that he would activate the Pierce Metro SWAT team to
23 respond to the scene. (*Id.*; *id.* at Ex. 6.)
24
25

1 At about the same time, Sergeant Nils Luckman, a certified hostage negotiator in a
2 neighboring city who had been monitoring the situation via radio, arrived to assist. From 11:20
3 pm to 12:24 am, Sgt. Luckman had 10 separate phone calls with Leonard, which consisted of “hang
4 ups, [Leonard] screaming and yelling, hang ups, call backs,” and so on. (Doc. 58 Ex. 11 at 7.) At
5 one point, Luckman asked Leonard whether E.T. was ok. (*Id.* at 10.) Witnesses dispute the manner
6 in which Leonard exhibited E.T. at the window, with accounts ranging from Leonard holding E.T.
7 in front of him at the window to Leonard dangling E.T.’s entire body outside the window. (*See id.*
8 Ex. 6 at 1; Ex. 7 at 2; Ex. 13 at 15; *id.* Ex. 14; Doc. No. 77 Ex. 7 at 56; Ex. 33 at 18-19.)

10 Leonard warned officers “not to use ‘flash bang’ grenades to enter the house.” (Doc. No.
11 58 Ex. 6.) Officer Johnson heard Leonard “yelling, ‘I don’t have any weapons, I don’t have any
12 weapons.’ Then in a lower voice, ‘Except a pistol.’” (Doc. No. 58 Ex. 14.) It is undisputed that
13 no officer heard Leonard make any threats to harm himself, his child, or any officer, and no officer
14 saw Leonard with a weapon. (Doc. No. 77 Ex. 4 at 14; Ex. 10 at 45-46; Ex. 11 at 30, 35-38; Ex.
15 12 at 17; Ex. 13 at 40, 42, 53-55; Ex. 12 at 17.) Kim informed officers that Leonard was unarmed
16 but was ignored because, as Officer Wiley described, “Baby’s momma, ‘No he ain’t got no gun,’
17 blah blah blah. I don’t know how many times I’ve heard that and found weapons.” (Doc. No. 81
18 Ex. 12 at 53.) Annalesa also told Sgt. Luckman that there were no guns in the house. (Doc. No.
19 77 Ex. 15 at 79.)

21 Sgt. Luckman states that Leonard repeatedly told him he was unarmed:

22 I had heard from somebody that he said he had a pistol at some point. But he never
23 said anything to me on the phone. And I kept repeating to him on the phone also,
24 “Do you have any weapons at all?” He goes, “No, I’m unarmed. I have nothing.
25 I’m” and he used the word “I’m unarmed” probably four to five times in the
conversation.

(Doc. No. 77 Ex. 16 at 10.)

1 At approximately 11:55 pm, Lt. Green called Fife Detective Jeff Rackley and instructed
2 him to prepare a search warrant for the residence in order to arrest Leonard for domestic violence
3 assault in the fourth degree, a misdemeanor. (Doc. No. 58 Ex. 16.) The warrant was signed at
4 2:00 am on May 24. (*Id.* Ex. 17.)

5 At approximately 12:20 am, the Pierce Metro SWAT Team arrived on the scene. (Doc.
6 No. 58 Ex. 6 at 2.) The Team brought two armored vehicles with them, an "AT" ("armored
7 transport") and a "Bearcat." The AT was driven across the neighbor's yard, through a fence
8 separating the neighbor's yard from the Thomas home, and parked just off the back patio of the
9 Thomas residence. (Doc. No. 58 Ex. 52.) The Bearcat was parked on the street in front of the
10 house. (Doc. No. 58 Ex. 53.) Officer Wiley informed the SWAT team that they were "responding
11 to basically assault 4 DV, barricaded male suspect has his four year old son maybe pseudo hostage.
12 The wife is outside. Made no threats towards the son." (Doc. No. 77 Ex. 12 at 1-2.)

13
14 The SWAT team consists of a tactical side, with Mike Wiley as Team Leader, and a team
15 of negotiators, which included Sgt. Mark Eakes of Lakewood and Mike Malave of Fife. (Doc. No.
16 77 Ex. 7 at 21; Ex. 27 at 1.) Overseeing field operations was Defendant Mike Zaro, the Assistant
17 Chief of Police for Lakewood. (Doc. No. 77 Ex. 23 at 30.) Malave made contact with Leonard
18 and had a brief conversation, as reported by Malave:

19
20 I spoke to him for maybe about ten minutes. Um, and he was - he was up and down
21 and he was angry, um, telling us that -- he was telling me that he wanted -- he
22 wanted nothing to do with the Fife Police Department, um, that he didn't want to
23 talk to any Fife officers and he was also saying that he wanted to, um, to have all
24 the officers leave his property. Um, he told me that, um, he wasn't gonna talk about
why he was angry, he wasn't gonna talk to me about why he was bleeding or why
he, um, um, he said something to the effect of why his mother had assaulted him.

25 (Doc. No. 58 Ex. 24 at 3.)

1 After four to five minutes, Leonard “became angry and hung up.” (*Id.* at 3.) Thereafter
2 phone calls to Leonard went straight to voicemail. (*Id.*) Leonard then called 911, which connected
3 him to the Fife Police Dispatch Center. (Doc. No. 58 Ex. 26 at 6.) Leonard told the dispatcher, “I
4 do not wish to speak to you guys. I need to be transferred back to 9-1-1 Dispatch and I would like
5 to have someone from a State Patrol or from a Pierce County Sheriff to come out.” (*Id.*) Leonard
6 explained, “Ma’am, I am sheltered in my house trying to stay away from the Fife Police
7 Department who are harassing me. I need to have a Sheriff out here.” (*Id.* at 8.) He further
8 explained, “The problem is that they are here surrounding my house and I’m asking them to leave.
9 . . . I’m on private property and I’ve had several occasions to tell them to leave.” (*Id.*)
10

11 The state patrol patched Leonard’s call to the cell phone of Sgt. Eakes, the SWAT team
12 leader and senior negotiator. Eakes recalled that Leonard told him, “I’m bipolar and I’ve got some
13 mental issues and am really upset about some things right now, [but] I don’t need you cops here.
14 Just get out of here.” (Doc. No. 58 Ex. 24 at 13.) Throughout the evening, Sgt. Eakes asked
15 Leonard more than once whether he had a gun, and every time Leonard said he did not. (Doc. No.
16 77 Ex. 32 at 24.)
17

18 The police had established a staging area in a convenience store parking lot a couple blocks
19 away. Kim and Annalesa had been brought to the staging area. At approximate 1:08 am, Fred
20 arrived at the staging area, in response to a call from Annalesa that Fred needed to come speak
21 with his son. (Doc. No. 77 Ex. 37 at 17.) Fred told an officer that he needed to go down the road
22 to a house he owned to talk to his son. (*Id.* at 18.) The officer responded, “You’re not going
23 anywhere.” (*Id.*). According to Officer Wyrwitzke, Fred “attempted to drive around the police
24 barricade and was advised he could not pass.” (Doc. No. 58 Ex. 18 at 2.) Fred agreed he “tried to
25 drive down the road” when a uniformed patrol officer “approached me and told me I can’t.” (Doc.

1 No. 58 Ex. 19 at 19.) Officer Wyrwitzke advised Fred “that his wife was seated in the back of my
2 patrol car and that it would probably be beneficial for him to stay and talk to her.” (*Id.* Ex. 18 at
3 2.) A short time later, Officer Wyrwitzke “looked up . . . and noticed that [Fred] was nowhere to
4 be found.” (*Id.* Ex. 16 at 2.) Annalesa told officers that Fred “was probably going to attempt to
5 gain access to their property via the backyard.” (*Id.*) Kim reported seeing Fred “run past the
6 [convenience store] to go to the back, ‘cause there’s a back way to get there.” (*Id.* Ex. 2 at 153)
7 She concluded Fred did this “so the cops won’t see him,” because “the police wouldn’t let anybody
8 just walk up to the house.” (*Id.* at 154.)
9

10 Fred reports walking to the back of his property, which was not marked with crime scene
11 tape and where he did not see any officers or vehicles. (Doc. No. 77 Ex. 31 at 67; Ex. 37 at 22-
12 23.) Fred climbed the six foot chain link fence surrounding the backyard, and says police “yelled,
13 Put your hands up, and shined lights in my face and just started screaming at me and basically
14 made me get on my knees and threw me to the ground and handcuffed me.” (Doc. No. 77 Ex. 37
15 at 23.) Fred recalls:
16

17 They throw me on the ground. Well, they push – I’m on my knees, they push me
18 to the ground, one puts his knee in my back, and I don’t know whether it’s him or
19 another person because there were two there and one’s zip tying me. And I tell
20 them I can’t breathe because I have COPD, and he says, You sure did hop that fence
fine. And I asked him to let me catch my breath and instead they say no, they yank
me up to a sitting position, drag me over to the tree and that’s when I see the SWAT
vehicle or whatever vehicle that was.

21 (*Id.* at 26-27.)
22

23 Officer Ryan Micenko, who was behind the house at the time, remembers “kind of hearing,
24 like rustling and looking back and seeing Fredrick jumping over the fence and coming – basically
25 sprinting towards us, towards the house.” (Doc. No. 58 Ex. 20 at 79.) Officer Micenko further
recalls “putting my flashlight on [Fred], identifying myself, telling him to stop several times. And

1 when he got pretty close to us – there were several of us there. We were kind of like a wall. He
2 lowered down to prone, like we eventually directed him to, and I placed him in handcuffs.” (*Id.*)
3 Micenko told Fred he was under arrest for obstructing “[b]ecause he attempted to get through our
4 cordon unlawfully. He made a physical step to get through the cordon and did not comply initially
5 with directives to stop all the way at the back of the property.” (*Id.* at 84.)

6 As negotiations with Leonard increasingly appeared unlikely to lead to a resolution, Eakes
7 suggested to the scene commanders that perhaps if Leonard let E.T. go, they could simply leave
8 for the night and come back to arrest Leonard another time. Chief Zaro agreed with the approach,
9 and asked Fife Police Chief Blackburn “if we get the son tonight, are you good with us leaving
10 here[?]” (Doc. No. 58 Ex. 24 at 14). Chief Blackburn agreed that “Yeah, if we have the son, then
11 you can – we can walk away from this thing tonight and we’ll get him at another time when it’s
12 not so volatile.” (*Id.*)

14 When Eakes first proposed to Leonard that the police would leave if Leonard gave up E.T.,
15 Leonard responded, “I’m not giving him up.” (*Id.* at 17.) Eakes reassured Leonard that “[E.T.]
16 could come out and we can give him to whoever you approve of. And then you can talk to that
17 person on the phone to know that they have [E.T.] and you can talk to [E.T.] and we’re gone.
18 We’re out of here.” (*Id.* at 18.) Eventually, Leonard responded, “Okay, we’ll do that.” (*Id.*)
20 However, when Eakes told Leonard that an officer would meet E.T. out front, Leonard got “real
21 intense that I inserted an officer, you know, coming up to him,” and told Eakes “he’s not going to
22 come to no officers. No officers are going to touch my son. You’re screwing with me again.”
23 (*Id.*)

24 Rather than handing off E.T. to a waiting police officer, Leonard demanded that “I want
25 my mom to come up here.” (*Id.*) Eakes told Leonard “we can’t let your mom come up to the door

1 . . . you guys already had one confrontation today and we can't let that happen again." (*Id.*) Eakes
2 continued pleading with Leonard to let E.T. leave the house, and Leonard continued demanding
3 that "mom come up and take him." (*Id.*) Eventually, Eakes suggested that Annalesa "meet [E.T.]
4 around the corner and it'd be like 20 seconds from the time you let him go to she's in – or he was
5 in mom's arms and then you – I'll make sure that you get to talk to make sure." (*Id.*) At that point,
6 Leonard stated "Okay. That sounds good . . . I gotta get him up." (*Id.*)

7 Approximately ten minutes later, SWAT Officers reported that Leonard had come out onto
8 the front porch, made E.T. sit down on the top step, then stood there behind him "an arm's length"
9 away. (*Id.* Ex. 27 at 13-14.) Leonard told Eakes he was outside with E.T., but again started
10 demanding that Annalesa "comes up to – bring her up to the porch now." (*Id.* Ex. 24 at 19.) Eakes
11 again explained to Leonard, "You don't have to go to jail, anything like that, but you've got to
12 start doing something for me and for yourself here. And, um – and your son . . . He doesn't need
13 to be involved in this kind of drama tonight, he needs to be with grandma." (*Id.* at 19.) Leonard
14 responded "Well, no, she's only – only if she comes up here," and he "kept saying I want to see
15 her." (*Id.*) Eventually, Leonard again said he was outside on the porch, and demanded that Eakes
16 "Tell her to come on up." (*Id.* at 19.) Again, Eakes told Leonard "Well, we can't. Just let him
17 go, you can watch him walk down to the – watch your son walk down a path and you can step
18 back in the door, shut the door, lock it and look out the window if you'd like." (*Id.*) Leonard
19 responded, "No. I'm not doing that." (*Id.*)

20 Based on Leonard's continued demands to have Annalesa come up to the house, his
21 continued refusal to let E.T. go, and the fact that he was now outside the house with E.T., Chief
22 Zaro radioed the entire SWAT Team, ordering them "Do not let that kid back in the house. If we
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24
25

1 are able to separate the kid from the dad, do not let him go back in the house.” (*Id.* at 14.) Zaro
2 explained that he gave this order

3 because of how agitated he was and because of all the background we have on him
4 and, um, just his – his irrational behavior throughout the night, I was very, very
5 concerned for that kid’s safety, and if we – if he, you know, within those four walls
6 of the house, we can’t see the kid, we don’t know where he’s at, we don’t know
what the dad’s got or where – where he’s at, so, um, our best chance of effecting a
safe separation is when they’re outside.

7 (*Id.* at 15.) The two SWAT Team snipers, Kenyon and Brian Markert, said they were initially
8 unsure whether Zaro’s order was a “delta order” to use deadly force. (Doc. No. 77 Ex. 28 at 24;
9 Ex. 29 at 62-63; Ex. 41 at 48.) Several other members of the SWAT team understood Zaro’s order
10 to authorize deadly force. (Doc. No. 77 Ex. 39 at 93; Ex. 31 at 82-83; Ex. 44 at 17-18; Ex. 51 at
11 92-93.)

12
13 Shortly after Zaro gave that order, Leonard took E.T. back inside the residence. (Doc. No.
14 58 Ex. 30 at 18.) A few minutes later, Leonard brought ET onto the porch, and then quickly
15 returned inside. As Eakes describes, “we kept going back and forth, back and forth . . . and he
16 kept going in and out of the house . . . he’s back in and out, you know, he’s back in, he’s back
17 out.” (*Id.* Ex. 24 at 20.) While Annalesa was not allowed to go up to the house, officers escorted
18 her up to the Bearcat, where Leonard could see and hear her. (*Id.* Ex. 28 at 129.)

19
20 Leonard sent E.T. out to sit on the top step again, but instead of coming out with him,
21 Leonard knelt down inside the doorway, using a wooden two-by-four to prop the door open.
22 SWAT Team sniper Brian Markert, watching through his rifle scope from across the street,
23 describes how “the door was basically partially open. The 2-by-4 was placed in a way that would
24 block the door from completely closing. And then Mr. Thomas was just inside the door, crouched
25 down . . . keeping an eye on [E.T.] who was sitting on the stoop.” (Doc. No. 58 Ex. 32 at 113,

1 116.) The other sniper, Officer Kenyon, confirms that Leonard was “kneeling inside the doorway,”
2 watching E.T. on the steps a few feet away. (*Id.* Ex. 30 at 19.)

3 Meanwhile, during the entire time Leonard was going in and out of the house, SWAT
4 officers had been trying to set a breaching charge on the back door. When Leonard would come
5 to the front door, the Team would approach the back door and attempt to set the charge. When
6 Leonard would go back inside, the Team would retreat from the back door to avoid detection, and
7 take up positions at the back of the house. (*Id.* Ex. 33 at 9-10.) By the time Annalesa arrived at
8 the Bearcat, the entry team had finished hanging the charge, and was prepared to breach the back
9 door if necessary.
10

11 Sergeant Thompson and Annalesa, standing at the rear corner of the Bearcat, could now
12 clearly see E.T. sitting on the porch. Annalesa began calling out to E.T., “Hey, come to Grandma.
13 Come to Grandma.” (*Id.* at 83-84.) Once again, though, Leonard refused to let E.T. go, and began
14 yelling directly to Annalesa, “No. Come up and get him. Just come get him,” and “Hey, Mom,
15 you come up here.” (*Id.* at 85.) Team Leader Mike Wiley, standing nearby, warned Thompson,
16 “No, she’s not going up there. We’re not going to introduce her. You know, we don’t know what
17 he’s going to do, so we’re not going to let her move forward.” (*Id.* at 84.) On the phone, Leonard
18 continued to get angrier at Eakes for refusing to let Annalesa come up to the house. (*Id.* Ex. 27 at
19 16.)
20

21 At approximately 2:45 am, Leonard and E.T. returned to the porch again. Leonard had
22 brought a car seat and a bag onto the porch. (Doc. No. 77 Ex. 18 at 34.) According to Officer
23 Malave, E.T. was on the third or fourth step down, and Leonard was in the doorway. (*Id.* Ex. 36
24 at 5.) Leonard said to the officers that “the only way he was letting E.T. go is if [Annalesa] walked
25

1 in front of the car all the way to the steps and . . . picked him up.” (*Id.* Ex. 22 at 34.) Annalesa
2 volunteered to walk up and get E.T., but the officers would not let her. (*Id.* Ex. 2 at 102.)

3 Chief Zaro perceived that “Leonard’s emotional state was devolving. I felt he was
4 hallucinating. He had already endangered the child and assaulted the child, and he [wasn’t doing
5 much more than] toying with us as far as saying he would release the child.” (Doc. No. 58 Ex. 28
6 at 134.) Chief Zaro gave permission to breach the back door with an explosive charge that was
7 designed to sever the hinges of the door and, due to its loud sound, overwhelm a subject’s senses
8 so that the subject freezes in place. (*Id.* Ex. 35 at 14; Ex. 36 at 30.)
9

10 When the breaching charge detonated, however, Leonard did not freeze. Instead, he ran to
11 E.T., grabbed him, and started retreating into the residence. The nature of Leonard’s action is in
12 dispute. Officer Markert describes Leonard holding E.T. with his “arms wrapped around his son’s
13 neck in a chokehold-like fashion.” (Doc. No. 58 Ex. 32 at 45-46.) Officer Wiley also thought
14 Leonard was going to hurt the child (*Id.* Ex. 37 at 48-49), and Officer Vance described Leonard’s
15 movement “like an angry snatch” (*Id.* Ex. 39 at 65-66). Officer Malave recalled that Leonard was
16 not holding E.T. by the throat. (Doc. No. 77 Ex. 35 at 36-37.)
17

18 While Leonard was holding E.T., Officer Markert fired his rifle, striking Leonard just
19 above the belt line on the right side of his abdomen. (Doc. No. 58 Ex. 32 at 277-78.) Leonard fell
20 backward into the house. (*Id.*) Officers entering through the rear door encountered Leonard sitting
21 on the floor, clutching E.T.’s back against his chest. (*Id.* Ex. 41 at 61-62.) As the officers struggled
22 to pry E.T. from Leonard’s arms, Officer Derig “started punching [Leonard] in the face to get him
23 distracted and some pain compliance so he’d let go of the kid.” (*Id.* Ex. 42 at 47.) Officer Wilson
24 recalls Leonard’s last words were, “Don’t hurt my boy.” (Doc. No. 77 Ex. 53 at 32, 47.) Kim
25

1 examined E.T., and found that “he was not hurt and did not have any bruises or other marks around
2 his neck or anywhere else.” (Doc. No. 71 ¶ 6.)

3 Meanwhile, as Officer Vance ran toward the house after the breach, Leonard’s dog came
4 around the house and charged him. (Doc. No. 58 Ex. 39 at 60-62.) Vance tried to hit the dog with
5 his rifle, but the dog came at him again. Vance shot the dog one time, then proceeded past it
6 toward the porch. Officer Wiley, following behind Vance, saw the dog start getting back up, and
7 fired three more rounds, killing the dog in the front yard. (*Id.* Ex. 37.) Leonard was transported
8 to St. Joseph’s Medical Center in Tacoma, and pronounced dead at 3:16 am. (*Id.* Ex. 48.)

9
10 The City of Lakewood conducted a review of the Thomas shooting. Chief Zaro was the
11 ranking member of the shooting review board. (Doc. No. 77 Ex. 55 at 7.) The Lakewood Board
12 found that Officer Markert’s use of deadly force “was legal and within policy . . . of the City of
13 Lakewood.” (*Id.* Ex. 29 at 243; Ex. 55 at 1.)

14 **III. STANDARD OF REVIEW**

15 A motion for summary judgment should be granted if there is no genuine issue of material
16 fact. Fed. R. Civ. P. 56(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The
17 moving party bears the initial burden of informing the court of the basis for the motion, and
18 demonstrating the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
19 317, 323 (1986). “[C]ourts may not resolve genuine disputes of fact in favor of the party seeking
20 summary judgment.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). “The evidence of the non-
21 movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*,
22 477 U.S. at 255. “In cases where the best (and usually only) witness who could offer direct
23 testimony for the plaintiff about what happened before a shooting has died, our precedent permits
24 the decedent’s version of events to be constructed circumstantially from competent expert and
25

1 physical evidence, as well as from inconsistencies in the testimony of law enforcement.” George
2 v. Morris, 736 F.3d 829, 834 (9th Cir. 2013).

3 **IV. DISCUSSION**

4 Defendants move for summary judgment on several groups of claims. The Court will
5 address each in turn.

6 **A. Fred’s Claim for Unreasonable Seizure**

7 First, Fred claims Officers Micenko and Cannon violated his Fourth Amendment rights
8 when they arrested him for trying to break through the SWAT perimeter. The Fourth Amendment
9 prohibits arrests without probable cause. *Beck v. Ohio*, 379 U.S. 89, 90–91 (1964). Probable cause
10 exists where the arresting officer is aware of facts and circumstances “sufficient to warrant a
11 prudent man in believing that the [suspect] had committed or was committing an offense.” *Id.* at
12 91. “[I]n a § 1983 action the factual matters underlying the judgment of reasonableness generally
13 mean that probable cause is a question for the jury.” *McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th
14 Cir. 1984).
15

16 Under Washington law, “[a] person is guilty of obstructing a law enforcement officer if the
17 person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his
18 or her official powers or duties.” RCW 9A.76.020. Officer Micenko told Fred he was under arrest
19 for obstructing “[b]ecause he attempted to get through our cordon unlawfully. He made a physical
20 step to get through the cordon and did not comply initially with directives to stop all the way at
21 the back of the property.” (Doc. No. 58 Ex. 20 at 84.) Fred disputes Officer Micenko’s account,
22 and recalls halting and complying with police orders as soon as they were communicated to him.
23 (Doc. No. 77 Ex. 37 at 23.) The jury must determine whose story is more credible.
24
25

1 An arrest may also violate the Fourth Amendment if it is executed with excessive force.
2 The Fourth Amendment requires police officers making an arrest to use only an amount of force
3 that is objectively reasonable in light of the circumstances facing them. *Tennessee v. Garner*, 471
4 U.S. 1, 7–8 (1985). Determining whether a specific use of force was reasonable “requires a careful
5 balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests
6 against the countervailing government interests at stake.” *Graham v. Connor*, 490 U.S. 386, 396
7 (1989) (internal quotation marks omitted). Relevant factors to this inquiry include, but are not
8 limited to, “the severity of the crime at issue, whether the suspect poses an immediate threat to the
9 safety of the officers or others, and whether he is actively resisting arrest or attempting to evade
10 arrest by flight.” *Id.* “[B]ecause the excessive force and false arrest factual inquiries are distinct,
11 establishing a lack of probable cause to make an arrest does not establish an excessive force claim,
12 and vice-versa.” *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004).

14 Fred claims that he immediately submitted to the officers’ compliance orders, and while
15 on his knees the officers pushed him to the ground, put a knee in his back while he was being
16 handcuffed, yanked him to a sitting position, and dragged him to a nearby tree, all while behaving
17 rudely. (Doc. No. 77 Ex. 37 at 26-27.) If the jury credits Fred’s account of immediate submission,
18 then the jury may also determine whether his rough handling by police was disproportionate and
19 unreasonable. Such questions are quintessentially for the finder of fact.
20

21 Defendants’ Motion for Summary Judgment is DENIED as to Fred’s claims for arrest
22 without probable cause and for excessive force.

23 **B. Claim for Unreasonable Search/Entry into the House**

24 The Estate alleges that Defendants unreasonable searched and seized Leonard’s home in
25 violation of the Fourth Amendment by entering and remaining on Leonard’s property without a

1 warrant or legal cause; obtaining a search warrant without probable cause and with false
2 information; and executing the warrant in an unreasonable and violence manner. Fred, Annalesa,
3 and E.T. bring a parallel claim.

4 First, Plaintiffs allege Defendants Wiley and Zaro improperly ordered entry onto their
5 property without exigent circumstances before the warrant was issued. This complaint ignores the
6 fact that Annalesa summoned police to the residence by dialing 911 and explained to the officers
7 that Leonard had grabbed her wrist and took her phone. (Doc. No. 58 Ex. 1 at 113.) Once Annalesa
8 invited the police onto her property, she never asked them to leave. Officers do not violate the
9 Fourth Amendment when they enter property at the homeowner's request to investigate a reported
10 domestic assault.
11

12 Plaintiffs next allege Defendants obtained a search warrant without probable cause and
13 with false information. Plaintiffs do not attempt to rebut Defendants' argument on this issue, and
14 therefore the Court deems this claim to have been abandoned by Plaintiffs.
15

16 Next, Plaintiffs allege Defendants executed the warrant unreasonably by using explosives
17 on the back door of the house without justification and without warning, and by shooting Leonard
18 and his dog. Even when a warrant is validly issued, a Plaintiff may nevertheless claim the warrant
19 was "unreasonably executed." *Dalia v. United States*, 441 U.S. 238, 258 (1979). A § 1983 claim
20 for unreasonable execution of a warrant "requires a precise determination of which specific acts
21 amounted to unreasonable conduct, which actors engaged in that conduct, and what damage each
22 unreasonable act caused. The Ninth Circuit has repeatedly stressed that such findings are reserved
23 for the trier of fact." *Torre v. City of Renton*, 164 F. Supp. 3d 1275, 1284 (W.D. Wash. 2016).
24 Given the state of negotiations with Leonard – he was on the front porch with E.T., a car seat, and
25 a bag, requesting Annalesa come to escort E.T. – a reasonable jury could find that the use of an

1 explosive charge was inherently dangerous and predictably spurred Leonard to grab his son and
2 retreat into the cover of his home, which dramatically increased the risk of injury and death.

3 As for the shooting of the dog, “The killing of a dog is a destruction recognized as a seizure
4 under the Fourth Amendment and can constitute a cognizable claim under § 1983.” *San Jose*
5 *Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005)
6 (alteration adopted, quotations omitted). In *Hells Angels*, law enforcement entry teams were given
7 approximately one-week advance notice to prepare searches of residences for evidence of gang
8 activity. *Id.* at 967. Two of the residences entered and searched had large, aggressive dogs, which
9 police officers shot and killed. *Id.* at 967-68. In determining whether the shooting of the dogs
10 violated the owners’ Fourth Amendment rights, the Ninth Circuit balanced “the nature and quality
11 of the intrusion on the individual’s Fourth Amendment interests against the countervailing
12 governmental interests at stake.” *Id.* The Court recognized that the intrusion inherent in killing a
13 family pet is severe. *Id.* at 975. The purported government interests – namely, the need to ensure
14 stealth, speed, and safety of the officers – were deemed insufficient to justify the intrusion for
15 purposes of determining whether the defendant officers were entitled to qualified immunity. *Id.*
16 at 976. The Court considered that the officers developed no realistic plan other than shooting the
17 dogs while serving the search warrants, despite having a week’s advance notice to prepare; none
18 of the plaintiffs were potential suspects; and silencing the dogs to ensure stealth was not advanced
19 by discharging four loud shotgun blasts at the dogs. *Id.* at 976-77.

22 Here, officers had several hours to develop a non-lethal strategy for addressing Leonard’s
23 dog. As Defendants recount, “Throughout the standoff, Leonard’s large dog was running around
24 the front and back yards, and in and out of the house. Various officers testified how Leonard
25 would yell ‘Get em – get em, that’s right, boy, good boy’ and the dog would then ‘bark and be

1 aggressive.” (Def. Motion, Doc. No 57 at 26, quoting Doc. No. 58 Ex. 42 at 58-59.) Thus,
2 Defendants were clearly aware of the dog’s presence and potential danger over the course of the
3 evening and night, and a jury could find that it was unreasonable for Officers Vance and Wiley to
4 charge the house without any contingency for controlling the dog. Thus, the Court finds that there
5 are multitudinous questions as to whether Defendants’ execution of the warrant was reasonable,
6 and summary judgment, therefor, is denied.

7 **C. The Estate’s Claim for Excessive Force**

8 Excessive force is examined under the Fourth Amendment’s prohibition of unreasonable
9 searches and seizures. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Whether the officers’
10 use of explosives followed by deadly force was reasonable in these circumstances is a question
11 fraught with factual issues. Under *Graham*, three specific factors must be considered in assessing
12 the reasonableness of the force used: (1) the severity of the crime at issue, (2) whether the suspect
13 poses an immediate threat to the safety of the officers or others, and (3) whether he is actively
14 resisting arrest or attempting to evade arrest by flight. *Smith v. City of Hemet*, 394 F.3d at 701
15 (citing *Graham*, 490 U.S. at 396). Whether the suspect poses a threat to the safety of officers or
16 others is “the most important single element of the three specified factors.” *Chew v. Gates*, 27
17 F.3d 1432, 1441 (9th Cir. 1994).

18 Officer Markert defends his decision to shoot Leonard on the basis of the chokehold
19 Leonard allegedly applied to E.T. after the explosive charge was detonated at the rear of the house.
20 However, according to Officer Malave, Leonard was not holding E.T. by the throat. (Doc. No. 77
21 Ex. 35 at 36-37.) And circumstantial evidence undermines the objective reasonableness of
22 Markert’s belief that E.T. was in serious danger. Over the course of the standoff, Leonard
23 repeatedly stated he was unarmed. There is no testimony that he ever threatened officers or E.T.
24
25

1 Instead, Leonard consistently sought to ensure E.T.'s wellbeing. For example, Leonard asked the
2 police to leave his property because they were scaring his son (Doc. No. 58 Ex. 10 at 1), and,
3 according to Markert's statement, warned officers, "I have a four year old in here. Don't be
4 smashing in my door, using your stun grenades or blowing my door off the hinges" (Doc. No. 81
5 Ex. 11 at 6). Shortly before the shooting, Leonard had brought E.T. to the front porch with a car
6 seat. (*Id.* Ex. 12 at 38.) A reasonable factfinder could find incredible Markert's suggestion that
7 the explosive breach suddenly caused Leonard to treat his son in a way that risked serious,
8 immediate harm.
9

10 The other *Graham* factors – the severity of the crime at issue, and the suspect's attempts to
11 actively resist arrest or evade by flight – also present factual questions. Officers sought to arrest
12 Leonard for assault based on the reporting of domestic violence because he grabbed Annalesa's
13 wrist and took the phone from her while she was calling 911. Such misdemeanors do not generally
14 necessitate a lethal response. Additionally, Leonard was not attempting to evade by flight; in fact,
15 at the time of the shooting, the officers planned to not arrest Leonard that night. (Doc. No. 58 Ex.
16 24 at 14.) A jury could find that it was unreasonable for an officer to conclude that deadly force
17 was warranted in this situation.
18

19 **D. Claim for Deprivation of Familial Relationship**

20 Fred, Annalesa, and E.T. bring a claim for the deprivation of their familial relationship
21 with Leonard.⁴ Under the Due Process Clause of the Fourteenth Amendment, a decedent's parents
22 and child have an interest in their familial relationship with the decedent. *Johnson v. Bay Area*
23 *Rapid Transit Dist.*, 724 F.3d 1159, 1168-69 (9th Cir. 2013) (parents); *Hayes v. Cty. of San Diego*,
24

25 ⁴ While the Estate's complaint also includes a claim for deprivation of Leonard's familial
relationship with E.T, the Estate does not attempt to rebut Defendants' argument on this issue, and
therefore the Court deems this claim to have been abandoned by Plaintiffs.

1 736 F.3d 1223, 1229-30 (9th Cir. 2013) (child). To establish a violation of due process, a plaintiff
2 must prove that the officer's action "shocks the conscience." *Hayes*, 736 F.3d at 1230.

3 The "shocks the conscience" standard differs from the excessive force standard under the
4 Fourth Amendment. "In determining whether excessive force shocks the conscience, the court
5 must first ask 'whether the circumstances are such that actual deliberation [by the officer] is
6 practical.'" *Id.* (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir.2008)). "Where actual
7 deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the
8 conscience. On the other hand, where a law enforcement officer makes a snap judgment because
9 of an escalating situation, his conduct may be found to shock the conscience only if he acts with a
10 purpose to harm unrelated to legitimate law enforcement objectives." *Id.* "Whether an official
11 had the requisite knowledge is a question of fact subject to demonstration in the usual ways, and a
12 factfinder may conclude that the official knew of a substantial risk from the very fact that it was
13 obvious." *Farmer v. Brennan*, 511 U.S. 825, 826 (1994).

15 Plaintiffs argue the deliberate indifference standard applies to Chief Zaro's order
16 authorizing lethal force to prevent Leonard from reentering the home with E.T, and to Chief Zaro's
17 order to breach the back door.⁵ While Leonard was on his front porch with E.T., Chief Zaro
18 radioed the entire SWAT Team, ordering them "Do not let him back in the house with that kid."
19 (Doc. No. 89 Ex. B at 30.) Zaro explained that he gave this order
20

21 because of how agitated he was and because of all the background we have on him
22 and, um, just his – his irrational behavior throughout the night, I was very, very
23 concerned for that kid's safety, and if we – if he, you know, within those four walls
24 of the house, we can't see the kid, we don't know where he's at, we don't know
what the dad's got or where – where he's at, so, um, our best chance of effecting a
safe separation is when they're outside.

25 ⁵ Plaintiffs also bring a deliberate indifference claim based on Officer Wiley's alleged decision to
request authorization to breach the back door. However, Plaintiffs do not provide any evidence
that Wiley requested authorization to breach.

1 (Doc. No. 58 Ex. 27 at 15.)

2 The Metro SWAT Manual contains five explicit requirements for issuance of a delta order.
3 (Doc. No. 89 at Ex. C.) The word “delta” must be used; only the Incident Commander – here,
4 Chief Blackburn – may authorize a delta order; team members must acknowledge receipt of the
5 delta order; the delta order must identify the incident commander authorizing the order; and the
6 person issuing the order must identify the affected team member(s) receiving the order. (*Id.*) Chief
7 Zaro’s statement did not comply with these five protocols.
8

9 Officer Markert explained that initially it was not clear to him whether Chief Zaro’s order
10 was a delta order, and that he spoke with Officer Kenyon, a fellow sniper, to decipher what Zaro
11 meant. (Doc. No. 77 Ex. 28 at 14.) He recognized that the order did not contain the specific
12 language required by the protocol, but nonetheless concluded that Chief Zaro was communicating
13 that E.T. was at the risk of physical injury or death if he returned inside the house. (*Id.* at 15.) The
14 order “heighten[ed his] sense of concern” “that the hostage was facing some sort of, you know,
15 threat of, or physical harm or, or death at the hands of the suspect.” (*Id.*) Officer Kenyon testified
16 that Chief Zaro’s order was ambiguous, and “I think the whole team probably was unclear about
17 that order.” (Doc. No. 77 Ex. 41 at 48; *see also* Doc. No. 77 Ex. 39 at 93; Ex. 31 at 82-83; Ex. 44
18 at 17-18; Ex. 51 at 92-93.) Clearly, the situation was one that must be presented to a jury to
19 examine.
20
21

22 Likewise, Chief Zaro explained that when he authorized the explosive breach, he
23 considered the “flight or freeze, you know, response to sudden stress and shock. And the vast
24 majority of the time that we’ve done that, it’s been freeze.” (Doc. No. 89 Ex. D at 131-32.) Thus,
25 Chief Zaro was cognizant that “flight” was a potential response to the sudden shock of the rear
door breach. It is for the jury to determine whether Chief Zaro was deliberately indifferent to the

possibility that the breach would trigger in Leonard a reflexive flight response, and that his sudden retreat into the house – in combination with or independent from his order that the SWAT team was not to allow Leonard into his house with E.T. – would result in his fatality. Accordingly, summary judgment is denied as to Plaintiffs’ claim for deprivation of a familial relationship.

E. Plaintiffs’ Claim for Unreasonable Seizure of E.T.

The Individual Plaintiffs contend that Defendants Zaro, Wiley, and Markert violated E.T.’s Fourth Amendment rights when they seized him from his father. Because Defendants sought to remove a minor from his custodial parent in order to protect the minor’s health and safety, the case law derived from child abuse investigations is more analogous than the hostage cases cited by Defendants. The Ninth Circuit has articulated the governing standards:

Under the Fourteenth Amendment right to familial association, an official who removes a child from parental custody without a warrant “must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.” *Rogers v. Cnty. of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007). The child subjected to seizure is also protected by the Fourth Amendment’s prohibition against unreasonable searches and seizures. *Kirkpatrick v. Cnty. of Washoe*, 792 F.3d 1184, 1187–89 (9th Cir. 2015); *Wallis*, 202 F.3d at 1137 n.8. While the constitutional source of the parent’s and the child’s rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. *Wallis*, 202 F.3d at 1137 n.8. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in “imminent danger of serious bodily injury.” *Id.* at 1138.

Jones v. Cty. of Los Angeles, 802 F.3d 990, 1000 (9th Cir. 2015)

Defendants articulate three physical threats E.T. faced over the course of night: 1) E.T. was “dangled” out the window by Leonard; 2) Leonard grabbed E.T. in a chokehold after the breach; and 3) Leonard was not equipped to attend to E.T. during the night because of his inebriation and manic temperament. All three are subjects of material disputes of fact. There is direct or circumstantial evidence to support a jury’s finding that E.T. was not in imminent danger of serious

1 bodily injury when the SWAT team determined that their primary goal was to extract E.T. for the
2 night; when Chief Zaro commanded the SWAT team not to allow Leonard to return into the home
3 with E.T.; when Chief Zaro authorized the breach of the rear door; or when Officer Markert took
4 the fatal shot.

5 **F. Plaintiff's *Monell* Claims**

6 The Supreme Court has held that municipalities may be held liable as “persons”
7 under § 1983 “when execution of a government’s policy or custom, whether made by its
8 lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts
9 the injury.” *Monell*, 436 U.S. at 694. A plaintiff may establish municipal liability by
10 demonstrating that an official with final policy-making authority “delegated that authority to, or
11 ratified the decision of, a subordinate.” *Ulrich v. City & County of San Francisco*, 308 F.3d 968,
12 984–85 (9th Cir. 2002). “If the authorized policymakers approve a subordinate’s decision and
13 the basis for it, their ratification would be chargeable to the municipality because their decision is
14 final.” *Id.* (citation omitted). To establish a ratification claim, Plaintiffs must present evidence
15 of “a ‘conscious, affirmative choice’ on the part of the authorized policymaker.” *Id.* (quoting
16 *Gillette*, 979 F.2d at 1347). “A local government can be held liable under § 1983 only where a
17 deliberate choice to follow a course of action is made from among various alternatives by the
18 official or officials responsible for establishing final policy with respect to the subject matter in
19 question.” *Id.* (internal quotations omitted). The policymaker must have knowledge of the alleged
20 constitutional violation. *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999).

23 Plaintiffs argue Lakewood is liable under *Monell* based on a “ratification theory” for the
24 finding of the Shooting Review Board that Markert’s actions were lawful and within policy. In
25 support of their argument, Plaintiffs cite *Rosales v. City of Chico*, No. CV21402152WBSCMK,

1 2015 WL 6167740, at *7–8 (E.D. Cal. Oct. 20, 2015), where the court denied the defendant city’s
2 motion for summary judgment on plaintiff’s *Monell* claim when the chief of police pronounced
3 that the allegedly offending officer’s conduct was “in compliance with Department policy.” The
4 court explained:

5 In this case, it is not a mere ratification, but rather the Chief of Police’s
6 pronouncement that Officer Bailey’s alleged use of force was “in compliance with
7 Department policy” that gives rise to a *Monell* claim. This is “tantamount to the
8 announcement or confirmation of a policy for purposes of *Monell*.” [] The Chief of
9 Police’s finding that Officer Bailey’s use of force was “in compliance” with the
10 City of Chico’s policies is more than sufficient to raise a genuine issue of material
11 fact with respect to whether the City of Chico had a policy of using the force Officer
12 Bailey did in this case. Although the finding was made after the incident, it
13 constitutes clear evidence from which a rational jury could infer that the policy
14 existed before the incident and therefore was the moving force that caused the
15 injury. If the jury ultimately concludes that Officer Bailey used excessive force and
16 that the use of force comported with the City of Chico’s policies, it would be
17 entirely consistent with *Monell* to hold the City of Chico liable based on its policy
18 promoting that use force.

19 Accordingly, because plaintiff has raised a genuine issue of material fact with
20 respect to whether the City of Chico had a policy that caused the constitutional
21 violation alleged in this case, the court must deny defendants’ motion for summary
22 judgment on plaintiff’s § 1983 *Monell* claim.

23 *Id.* (footnote omitted).

24 Defendants respond that *Monell* liability is improper because the Shooting Review Board
25 adopted Officer Markert’s version of the facts, and under his version the shooting was not
unconstitutional. In support, Defendants cite *Kanae v. Hodson*, 294 F. Supp. 2d 1179, 1191 (D.
Haw. 2003), where the court held:

26 The law does not say that every failure to discipline an officer who has shot
27 someone is evidence of a “whitewash” policy or some other policy of “sham”
28 investigations. The law does not say that, whenever an investigative group accepts
29 an officer’s version over a victim’s differing version, this acceptance establishes a
30 policy for which a municipality may be held liable under § 1983. If that were the
31 law, counties might as well never conduct internal investigations and might as well
32 always admit liability. But that is not the law. The law clearly requires “something

1 more.” As Kanae presents nothing more than the failure to discipline Hodson, the
2 County is entitled to summary judgment on Kanae’s § 1983 ratification claim.

3 The Court finds the *Rosales* holding closer to the facts of the instant case. Municipalities
4 are required to review police shootings and carefully determine whether the shooting complied
5 with local policy, and then determine whether or not discipline is appropriate. Here, there is a
6 triable issue of fact regarding whether Officer Markert committed a constitutional violation by
7 shooting an unarmed man who had not made threats to police or his son over the course of the
8 evening – or whether the shooting was justified because Markert’s belief that E.T. was in imminent
9 danger of serious harm was objectively reasonable. A rational jury could find that Markert’s
10 decision to shoot was not constitutionally justified, and that Lakewood ratified that
11 unconstitutional decision by determining it was lawful and within policy. Summary judgment on
12 the *Monell* claim against Lakewood is accordingly denied.⁶

14 **F. Negligent Investigation Claim**

15 Finally, Defendants move for summary judgment on Plaintiffs’ negligence claims.
16 Generally, a claim for negligent investigation is not cognizable under Washington law. *Fondren*
17 *v. Klickitat Cty.*, 79 Wash. App. 850, 862 (1995); *see also Keates v. City of Vancouver*, 73 Wash.
18 App. 257, 267 (1994) (“As a general rule, law enforcement activities are not reachable in
19 negligence.”). The individual plaintiffs argue that their negligent investigation claim arises from
20 an exception provided by RCW 26.44.050, which creates “a general mandatory duty to
21 investigate” reports of child abuse, *Rodriguez v. Perez*, 99 Wn. App. 439, 448 (2000). In
22

24
25 ⁶ The Court has recently received Plaintiffs’ request (Doc. No. 100) to supplement their response to Defendants’
Motion with evidence and argument along the lines of an alternative theory of *Monell* liability developed in *Pembaur*
v. City of Cincinnati, 475 U.S. 469, 481 (1986). Because the Court has determined that Plaintiff’s ratification theory
is sufficient to defeat Defendants’ Motion as to this claim, it is unnecessary to determine whether Plaintiffs could also
defeat Defendants’ Motion with a *Pembaur* claim.

1 *Rodriguez*, the court held that unlike a “typical criminal investigation” that is “premised on a duty
2 that is owed to the public at large,” an investigation into a report of possible child abuse or neglect
3 “concerns a duty that is owed to a specific class of individuals.” *Id.* at 445. The rationale in
4 permitting negligent investigation claims in this class of cases is the “statutory duty to investigate
5 child abuse and the protected status of the parents and children bringing the claims.” *Id.* “Those
6 considerations apply equally to claims against law enforcement officers when those officers are
7 conducting investigations pursuant to the statutory directives set forth in RCW 26.44.” *Id.* This
8 is true even when the law enforcement officers are conducting a “criminal investigation” as well
9 as investigating the possible abuse or neglect. *Id.* at 446.
10

11 The individual plaintiffs argue “a reasonable jury could conclude that a negligent
12 investigation by defendants caused the wrongful, permanent separation of E.T. from his non-
13 abusive father,” because of such actions including “the breakdown in communications between
14 the negotiating team, the command staff, and the tactical team that culminated in Defendant Zaro’s
15 unreasonable orders authorizing the use of an explosive device and lethal force to take E.T. from
16 Leonard, [and] Defendants Wiley and Markert’s negligent failure to clarify the deadly force order.”
17 (Doc. No. 79 at 50-51.)
18

19 The Court has already recognized the apparent fit of the child abuse investigation analogy
20 in its discussion of E.T.’s claim for unreasonable seizure, Section E, *supra*, because police were
21 attempting to separate a child from his parent for the child’s safety and well-being without a
22 warrant. Such actions are governable under a reasonableness standard, and there is evidence to
23
24
25

1 suggest that the efforts made to secure E.T.'s safety were objectively unreasonable. This question,
2 once more, is properly for the jury.⁷

3 V. CONCLUSION

4 For the foregoing reasons, the Court rules as follows:

- 5 1. Defendants' Motion for Summary Judgment as to Fredrick Thomas' claim for
6 unreasonable seizure is DENIED;
- 7 2. Defendants' Motion for Summary Judgment as to Plaintiffs' claim regarding the
8 execution of the search warrant is DENIED;
- 9 3. Defendants' Motion for Summary Judgment as to the Estate's claim for the
10 unreasonable seizure of Leonard is DENIED;
- 11 4. Defendants' Motion for Summary Judgment as to the Family's claim for deprivation
12 of their familial relationship with Leonard is DENIED;
- 13
- 14
- 15
- 16

17 ⁷ Separately, the Estate argues that Defendants breached a duty of care they owed to Leonard.
18 (Doc. No. 80 at 22.) The Estate relies on *Coffel v. Clallam Cty.*, 47 Wash. App. 397 (1987), where
19 the owner and tenant of a commercial building brought suit against the county and various county
20 officials for failure of law enforcement officers to prevent destruction of the building. The court
21 found the "failure to enforce" exception to the public duty doctrine applied as to some of the
22 defendants. The court explained, "The public duty doctrine recognizes that the duties of public
23 officers normally are owed only to the general public. Generally, the statutory duty of officers to
24 provide police protection, RCW 36.28.010, and the common-law duty of municipalities to provide
25 police protection are owed to the public at large and are unenforceable as to individual members
of the public." *Id.* at 402. "An exception to the public duty doctrine provides that if a 'special
relationship' exists between the public officer and the plaintiff, a duty owed to the individual may
arise. [] Specifically, an actionable duty to provide police services will arise if (1) there is some
form of privity between the police department and the victim that sets the victim apart from the
general public, and (2) there are explicit assurances of protection that give rise to reliance on the
part of the victim." *Id.* 403. The Estate has not identified a relevant exception to the public duty
doctrine, or any other legal basis under Washington law for holding Defendants liable for
negligence. Accordingly, summary judgment is granted on this claim.

- 1 5. Defendants' Motion for Summary Judgment as to the Family's claim for unreasonable
2 seizure of E.T. is DENIED;
- 3 6. Defendants' Motion for Summary Judgment as to Plaintiffs' *Monell* claims is
4 DENIED;
- 5 7. Defendants' Motion for Summary Judgment as to the Family's negligence claims is
6 DENIED;
- 7 8. Defendants' Motion for Summary Judgment as to Plaintiffs' claim for entering and
8 remaining on their property without a warrant or legal cause is GRANTED;
- 9 9. Defendants' Motion for Summary Judgment as to Plaintiffs' claim for obtaining a
10 search warrant without probable cause and with false information is GRANTED;
- 11 10. Defendants' Motion for Summary Judgment as to the Estate's claim for deprivation of
12 Leonard's familial relationship with E.T is GRANTED;
- 13 11. Defendants' Motion for Summary Judgment as to the Estate's claim for negligence is
14 GRANTED.
15 GRANTED.

16
17 **SO ORDERED.**

18 Dated this 25th day of May, 2017.

19
20 

21 Barbara Jacobs Rothstein
22 U.S. District Court Judge
23
24
25